93-779

Supreme Court, U.S.
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No.

In the Supreme Court of the United States

Term, 19

DOROTHEA HUNTER,

Petitioner

vs.

CARBONDALE AREA SCHOOL DISTRICT AND NORTHEASTERN EDUCATION INTERMEDIATE UNIT NO. 19 (N.E.I.U. NO. 19),

Respondent

Petition for Writ of Certiorari To Review Judgment of the United States Court of Appeals for the Third Circuit

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STATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether this Court should resolve the conflict among various United States Circuit Courts of Appeal as to the appropriate level of Constitutional protection to be provided public school children, and in particular, special education non-secondary students such as Petitioner's decedent, to be free from unwarranted physical and/or sexual assault, particularly where the actions of the school authorities have placed the student in a position of state-created danger?

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Petition

IN THE SUPREME COURT OF THE
UNITED STATES

DOROTHEA HUNTER,

Petitioner

v.

CARBONDALE AREA SCHOOL DISTRICT AND
NORTHEASTERN EDUCATION INTERMEDIATE
UNIT NO. 19

(N.E.I.U. NO. 19)

PETITION FOR WRIT OF CERTIORARI TO REVIEW
JUDGMENT OF THE UNITED STATES COURT OF
APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the Associate
Justices of the Supreme Court of the United States:

Dorothea Hunter, the Petitioner herein, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, filed in the above-captioned case on July 26, 1993, a Petition for Rehearing en banc being denied by the Third Circuit on August 19, 1993.

REFERENCE TO THE OPINIONS DELIVERED IN THE COURTS BELOW

The Opinion of the United States District Court for the Middle District of Pennsylvania (Conaboy, J.) is not officially reported but is attached hereto at Appendix pages 1a through 17a. The Opinion of the United States Court of Appeals for the Third Circuit (panel) Decision is not officially reported but is attached hereto at pages 18a through 20a. The Opinion of the United States Court of Appeals for the Third Circuit dated August 19, 1993, which denies Petitioner's petition for rehearing is not officially reported but is attached hereto at pages 21a through 22a.

STATEMENT OF JURISDICTION

Federal jurisdiction was invoked in the Courts below pursuant to 28 U.S.C. §§1331 and 1343. The Courts below also had pendent jurisdiction over the state-based claims. Appellate jurisdiction in the Court of Appeals for the Third Circuit was invoked pursuant to 28 U.S.C. §1291. This Court has jurisdiction pursuant to 28 U.S.C. §1254(1).

STATUTE INVOLVED IN THE CASE

The sole statute, the interpretation of which is implicated in this Petition, is codified at 42 U.S.C. §1983 and provides, in full text, as follows:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia."

STATEMENT OF THE CASE

A. Statement Of The Proceedings In The Courts Below

This action was commenced by Complaint on November 15, 1991 in the United States District Court for the Middle District of Pennsylvania. An Amended Complaint was filed on January 2, 1992. Motions were filed by Defendants Carbondale Area School District and Northeastern Education Intermediate Unit #19 to dismiss the Amended Complaint for failure to state a claim on February 10 and February 14, 1992.

On March 20, 1992, the United States District Court entered an Order indicating that it would hold the Defendants' motions to dismiss in abeyance until such time as the United States Court of Appeals for the Third Circuit rendered its en banc Decision in *D.R. by L.R. v. The Middle Bucks Area Vocational Technical School*, 972 F.2d 1364 (3rd Cir. 1992), cert. den. 113 S.Ct. 1045, 122 L.Ed. 2d 354 (1993). Said en banc Decision was issued on August 11, 1992. Subsequent to issuance of said Decision, the District Court below issued an Order on August 18, 1992, directing the parties to submit additional briefs in light of the recent Decision of the Third Circuit in *D.R. by L.R.*

Following the submission of supplemental briefs, the District Court below on January 7, 1993 granted the Defendants' motion to dismiss the Petitioner's Amended Complaint and directed the clerk of courts to close the case. Petitioner timely filed a Notice of Appeal from said Order on January 20, 1993.

On July 26, 1993, a panel of the United States Court of Appeals for the Third Circuit affirmed the Order of the District Court granting the Defendants' motion to dismiss. Petitioner timely filed a Petition for Rehearing with the Third Circuit on or about August 6, 1993. This Petition was denied by the Court of Appeals for the Third Circuit on August 19, 1993. Three of the twelve Circuit Judges to whom the Petition for Rehearing was submitted would have granted rehearing by that Court en banc: Chief Judge Sloviter and Judges Becker and Nygaard.

B. Statement Of Relevant Facts

Given that this Petition addresses a judgment that Petitioner's Amended Complaint was insufficient to state a claim pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, exact quotation from the text of the Amended Complaint most aptly sets forth a concise statement of the relevant facts.

> "7. Under the Federal Handicapped Act and the Pennsylvania State Education Act, a child with a learning disability, i.e., an exceptional child, has a right to an appropriate education.
>
> 8. Defendants had a duty and obligation mandated by both Federal and State law to identify exceptional students and to develop educational programs appropriate to their particular needs.
>
> 9. In furtherance of the aforesaid duties and obligations imposed upon Defendants by both Federal and State law, Defendants were required to meet, on a periodic basis, with the parents, teachers and principal of any student identified as an exceptional student for the pur-

pose of developing and formulating an Individualized Education Program (I.E.P.) and a comprehensive multidisciplinary report for said students.

10. The purpose of an I.E.P. for an exceptional student, inter alia, is to identify and indicate the student's educational level and set precise goals for the specific special education service programs to be provided to the student. The I.E.P. is also to designate the specific placement and the extent to which the student will be able to participate in regular educational and disciplinary programs.

11. Plaintiff's decedent was a seventh grade special education student at the Carbondale Area Junior-Senior High School, Carbondale, Pennsylvania and at all times relevant hereto, was an exceptional student as defined by both Federal and Pennsylvania law, who was designated to receive an education under an 'Individualized Education Program' mandated by both Federal and State law which program was prescribed and implemented by the Defendants jointly, as instrumentalities of state government.

12. In accordance with the above, the I.E.P. prepared and implemented for David Hadden by Defendants jointly was to provide the basic educational 'blueprint' which the Defendants believed was best adapted, suited and tailored for David Hadden's individual learning and social growth and was to be followed toward furtherance of the goals set forth therein.

13. Federal and State law provides that prior to a change in placement or revision of an I.E.P., the I.E.P. team consisting of members of both Defendants, shall consider whether an eligible student might need the

application of school discipline procedure and shall determine whether the actual or anticipated behavior is attributable to the student's disability.

14. At all times relevant hereto, David Hadden was identified as an exceptional student by Defendants and Defendants jointly prepared an I.E.P. for David Hadden.

15. *An I.E.P.* printout on April 6, 1989 prepared by Defendants based on a meeting in May of 1989 *indicated that David Hadden* should be placed in a Secondary/Part-Time Program for Learning Disabled students and was *not to participate in any regular mainstream education* except for the specific areas of music, gym and home economics, only.

16. This report also indicated that other program options considered by Defendants, including regular class placement and part-time placement in a special education class were not recommended by the Defendants because they did not meet the student's needs and abilities. As part of this evaluation, Metropolitan Achievement tests were administered by Defendants to David Hadden in March of 1989, the results of which suggested that:

A. David possessed a reading skill level of grade 3.4;

B. David possessed a language arts skill of grade 3.9;

C. David possessed a math skill of grade 3.7.

17. The Plaintiff believes and avers that a Placement Option Form was subsequently prepared on April 21, 1989 indicating that David Hadden was to be placed into a Full-Time Special Class in a regular school which program was to be operated by and conducted jointly with

the Co-Defendant, N.E.I.U. No. 19 which program was to commence in September of 1989.

18. In accordance with the aforesaid I.E.P. and Placement Option Form, *David Hadden was not to be disciplined with mainstream non-exceptional students.*

19. In September of 1989, David Hadden attended 7th grade as a Special Education Student at Carbondale Area Junior High School located on Route 6 in Carbondale, Pennsylvania which building housed grades 7-12.

20. On or about November 15, 1989, David Hadden allegedly became involved in an altercation with another student in the hallway of the Carbondale Area High School during school time which *resulted in David Hadden being sent to detention with mainstream non-exceptional students on November 16, 1989,* the following day.

21. At the time of the incident on November 15, 1989, David Hadden was approximately 70 pounds and of frail build.

22. For quite some time prior to November 15, 1989, *David Hadden had been pursued, ridiculed, beaten, abused and earmarked 'A Sped' by certain youths who were non-exceptional students, not participants in* any Special Education Program and who *were older and more physically developed than David Hadden, which facts were widely known among various school children and school officials.*

23. For quite some time prior to November 15, 1989, David Hadden openly sought the company of other children to accompany him home to avoid being bullied, beaten, ridiculed and pursued by the aforesaid youths.

24. *During the calendar school year 1989,* from September forward, *David Hadden,* a special education student *was not placed in mainstream detention with non-exceptional students for any misbehavior in accordance with his I.E.P* and policies for exceptional students and was released from school property around 3:00 p.m. daily.

25. On November 16, 1989, *officials of the Carbondale Area School District and the N.E.I.U. No. 19 in contradiction of the I.E.P. for David Hadden prepared by both Defendants and in further violation of federal and state law as well as policies providing for exceptional students, placed David Hadden into a detention room with the aforesaid youths whom said officials knew or should have known, would engage in a course of conduct to jeopardize the health, welfare and wellbeing of David Hadden.*

26. During the aforesaid detention, an altercation again developed between David Hadden and the aforesaid youths, ... which apparently became heated enough to cause one of the youths to threaten to kill David Hadden.

27. Despite the foregoing, on November 15, 1989, the parents of David Hadden were never notified of the need for detention on November 16, 1989 which was not part of David's educational blueprint or I.E.P. and which had they been so informed, arrangements would have been made to pick David Hadden up following detention.

28. Despite all of the foregoing, Defendants released David Hadden and the aforesaid youths from detention at the same time when most, if not all teachers and adults had left the premises, and when they *knew or*

should have known of the threats to David's health, welfare and wellbeing by the ongoing actions of said youths who ... had a history of misbehavior and ill will toward David Hadden.

29. Upon release from detention, the abuses heaped upon young David Hadden continued unabated with David Hadden being hunted down and chased through the Carbondale Area High School building for several minutes momentarily concluding with David escaping from said youths.

30. Subsequently, when David Hadden was spotted outside, the horror continued with further pursuit by said youths of David Hadden around school grounds, across Route 6, ultimately to a point down an embankment along Fallbrook Creek.

• • •

33. While attempting to flee his said pursuers, Plaintiff's minor decedent, David B. Hadden, was forced into or is believed to have slipped, stumbled and fallen into Fallbrook Creek ...

• • •

37. The aforesaid pursuers, after seeing the Plaintiff's minor decedent in the frigid waters of said creek, grasping for every breath and struggling for his life, walked away ... and were overheard saying they would not have to worry about the decedent any further, all of which actions began in the detention room of the Carbondale Area School District where Plaintiff's minor decedent did not belong and continued unsupervised, unchecked both at that time and for a long period of time prior thereto which laxity and policy on the part of the Defendants constituted a breach of their legal obligations to Plaintiff's

minor decedent which ultimately led to his cruel untimely and horribly painful death.

38. The evening of November 16, 1989, David Hadden did not return home from school. Further, Plaintiff's decedent did not return to school the following day.

39. Plaintiff believes and therefore avers that Defendants whose actions as aforesaid had precipitated and condoned the events of November 16, 1989 did not commence an inquiry or search for David Hadden until, by mere happenstance, they allegedly overheard school children discussing how Plaintiff's minor decedent's body was 'cruising [sic] down the river', as a result of which local emergency and rescue efforts were delayed for a period of almost 24 hours after the disappearance of David B. Hadden.

40. Plaintiff's minor decedent, David B. Hadden, was declared missing on November 17, 1989, after having fallen into Fallbrook Creek and his body was recovered from the Lackawanna River, after an extensive search by local emergency and rescue workers, etc., on March 19, 1990, with date of death recorded by the Coroner of Lackawanna County as having occurred on March 19, 1990 and cause of death was listed as hypothermia and drowning.

41. Plaintiffs aver that *said acts of the Defendant establishes a policy of acquiescence and approval as well as established custom and practice on the part of the Defendants thus violating Plaintiff's rights as guaranteed by the Fourteenth Amendment to the U.S. Constitution, Article 1, Section 1 of the Pennsylvania State Constitution and the laws of the United States and the State of Penn-*

sylvania, and there is no adequate remedy available in State Court.

42. *The aforesaid acts, acquiescence and approval constituted a pernicioius [sic] practice, custom and/or policy of reckless indifference to instances of known abuse of Special Education Students generally and of Plaintiff's minor decedent specifically.*

43. *Defendants failed to provide adequate training and/or supervision to its agents, servants, workmen and/or employees with regard to Special Education Students, their care and protection.*

44. *Further, despite ongoing practice of Special Education Students being abused routinely which facts were known to Defendants, Defendants maintained no system and/or an inadequate system to review school discipline which policy has failed to remedy improper behavior and in fact condoned same.*

45. *The aforesaid acts of the Defendants constituted gross negligence and/or reckless indifference to the rights of Plaintiff's minor decedent.*

• • •

47. *Under applicable state law a special relationship existed between the Defendants and students entrusted to their care* including Plaintiff's decedent, David B. Hadden, and the aforesaid youths. *The Defendants had a right to control, discipline and/or direct the actions of the aforesaid youths.*

48. The Defendants had a *clearly established duty to protect David B. Hadden from the actions of other students over whom they had control.*

49. Further, *when the Defendants took David B. Hadden into their custody and held him against his will in detention, the Constitution imposed upon them a corresponding duty to assume some responsibility for his safety and well being.*

50. *The Defendants knew or should have known of the widespread, vicious and enduring attacks upon the person of David Hadden and failed to take any remedial action for the safety and well being of this special education child of tender years.*

51. *Further, Plaintiff's minor decedent should not have been disciplined in the fashion utilized by Defendants but rather should have been disciplined if warranted by the I.E.P. and policies applicable to a special education student.*

52. *In addition to their breach of their legal duty for the safety and well being of David B. Hadden, and/or policy practice and/or custom of non intervention and/or acquiescence, Defendants actively participated under color of state law to deprive Plaintiff's decedent, David B. Hadden, of his constitutionally protected rights of life, liberty and well being by placing him into an environment where he did not belong and thereafter leaving him unprotected to fend for himself against youths who were older and more physically developed and who had threatened his very life which actions ultimately led to David B. Hadden's cruel and painful death.*

• • •

60. Under the Fourteenth Amendment of the Constitution of the United States, is the *right to be free from unjustified intrusions on personal security. Further, cor-*

poral punishment in public schools implicates a protected liberty interest.

61. The within Defendants violated the Fourteenth Amendment by placing David B. Hadden in a detention room with non-special education students who were older, in senior grades, more physically developed than David B. Hadden and who were known to have had a lengthy history of animosity toward and abuse of David B. Hadden which actions ultimately led to the foreseeable result of physical harm upon the person of David B. Hadden.

62. The aforesaid actions of the within Defendants, acting under color of state law, caused a denial of Plaintiff's rights guaranteed by the Fourteenth Amendment to the Constitution of the United States which actions caused the untimely, cruel and painful death of Plaintiff's decedent, a frail 70 pound special education student of tender years.

• • •

73. Under applicable Pennsylvania law, a special relationship existed between the Defendants and its special education students by which the Defendants were entrusted to develop and implement a specially individualized educational program best suited to develop the students educational and special skills, which included David Hadden.

74. The Defendants had a duty to David Hadden to implement the I.E.P. program in the manner as set forth in the I.E.P. and not to deviate from said I.E.P. without meeting to discuss an alteration from said individualized program beforehand.

75. Included in this I.E.P. were or should have been consideration of discipline procedures and a separate discipline program should have been incorporated into his I.E.P.

76. *Defendants failed to incorporate an effective individual disciplinary program which was required under Pennsylvania law concerning exceptional students.*

77. Defendants acting under color of state law, by their wrongful inclusion of the special education Plaintiff's decedent into an after-school disciplinary detention program with older, more physically developed non-special education or regular students specifically violated the Plaintiff's student's mandated right to an education for exceptional children under Pennsylvania law by placing him in a regular education setting otherwise prohibited under the I.E.P. prepared by Defendants, which actions ultimately led to Plaintiff's decedent's untimely, painful and cruel death. (Emphasis added.)

REASONS FOR ALLOWANCE OF THE WRIT

A. The Conflict Among The Circuits

The Decisions of various United States Courts of Appeals are in conflict as to whether the physical or sexual abuse and molestation of school children rises to the level of a constitutional deprivation which is subject to protection pursuant to 42 U.S.C. §1983. One Circuit, the United States Court of Appeals for the Fifth Circuit, recently determined the following: "... we ask whether school officials have some affirmative duty to protect school children from tortious conduct by others. This inquiry can be explored from two angles: either from the perspective that school officials are responsible for properly monitoring and disciplining subordinates (such as school teachers) over whom they exercise supervisory authority; or from the viewpoint that school officials have a constitutional duty to protect school children from known or reasonably foreseeable harms occurring during or in connection with school activities. From either standpoint, *we find such a duty*". *Doe v. Taylor Independent School Dist.*, 975 F.2d 137, 144 (5th Cir. 1992), cert. den. 113 S.Ct. 1066, 122 L.Ed. 2d 371, 61 U.S.L.W. 3499, reargument en banc ordered, 987 F.2d 231 (5th Cir. 1993). (Emphasis added.)

The Court in *Doe* summarized its conclusion as follows: "... public school officials have a duty to police the misconduct of their subordinates and to protect school children from hazards of which the school officials know or should know. Their deliberate indifference to these duties can form the basis of liability against them." *Id.* at 147. The Court in *Doe* further noted that a school official's duty to protect public school

children is not limited to injuries inflicted directly by school teachers, citing *Lopez v. Houston Indep. School Dist.*, 817 F.2d 351, 354 (5th Cir. 1987) (failure to properly train school bus drivers in the face of evidence of a pre-existing pattern of student fights on buses constituted a widespread problem mandating an official response).

Moreover, the Eighth Circuit Court of Appeals, while affirming the grant of a summary judgment in favor of a school district and school officials with reference to a complaint alleging the sexual molestation of handicapped school children by a school bus driver, stated that school officials could be subject to personal liability where it can be proved that they:

> "1) Received notice of a pattern of unconstitutional acts committed by subordinates;
>
> 2) Demonstrated deliberate indifference to or tacit authorization of the offensive acts;
>
> 3) Failed to take sufficient remedial action; and
>
> 4) That such failure proximately caused injury to the children."

Jane Doe "A" v. Special School District of St. Louis Co., 901 F.2d 642, 645 (8th Cir. 1990).

In contrast, a number of other circuits, including the Third Circuit Court of Appeals, have determined that public schools do not have a "special relationship" with their school children, wherein they could be held liable for failing to protect their students from the private actions of third parties. *Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348, 352 (11th Cir. 1989).

For example, in *D.R. by L.R. v. The Middle Bucks Area Vocational Technical School, supra,* the Third Circuit found that no such special relationship exists, because the "... parents

remain the primarily [sic] caretakers ..." of public school children. *Id.* at 1371.

A panel Decision of the Tenth Circuit in *Maldonado v. Josey,* 975 F.2d 727, 733 (Opinion of Circuit Judge Tacha and District Judge Benson, sitting by designation), (10th Cir. 1992), cert. den. 113 S.Ct. 1266, 61 U.S.L.W. 3581, concluded that state compulsory attendance laws do not impose the restraints on individual liberty that implicate the Due Process Clause of the Fourteenth Amendment.

However, in *Maldonado,* Circuit Judge Seymour, while concurring would "... hold that a child legally required to attend school is thereby forced into the temporary day-time custody of the state's agents is constitutionally entitled to some level of protection from harm and care for basic safety ... I believe the state owes a constitutional duty to protect for the reasonable safety of children required to attend school ...". *Id.* at 733, 755.

(The result in *Maldonado* may be a perfect example of the rubric that "hard cases make bad law". The factual predicate of the constitutional claim in *Maldonado* was that an eleven-year-old fifth grader, who was unsupervised in a cloakroom for approximately 20 minutes, "became caught on his bandana in a cloakroom adjacent to his classroom and died of strangulation." *Id.* at 728. The sparse facts in the reported Opinion offer no clue as to why the child was in the cloakroom, how he became "caught on his bandana", or whether this was a self-inflicted injury of which the school teacher and authorities had no previous warning.)

In *J.O. v. Alton Community Unit School Dist. 11,* 909 F.2d 267 (7th Cir. 1990), the 7th Circuit ruled that sexual molestation of school children by a school teacher was not actionable under §1983, declining to find an affirmative constitutional

duty on the part of local school officials to protect its school children. *Id.* at 267.

Petitioner submits that the conflict among the various Circuit Courts of Appeals as to the interpretation of §1983 in the context of the appropriate level of protection to be afforded public school children is plain and requires resolution by this Court.

B. The Courts Below Failed To Distinguish This Matter From The Decision In *D.R. by L.R. v. Middle Bucks Area Vocational Technical School, Supra*, And Thereby Failed To Provide Any Constitutional Protection For Special Education Non-Secondary Students Such As Petitioner's Decedent

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These proceedings involve a question of exceptional importance, to wit, whether under the circumstances which led to the death of Petitioner's decedent, public school authorities have a duty to protect and preserve public school children's liberty interests to be free from unwarranted assault, particularly where the actions of school authorities, in placing the decedent, a Special Education Student with a third grade education level, in detention with mainstream students who had a history, known to the authorities of harassing and abusing such "speds", put the decedent in a position of state-created danger which led directly to his death.

The unanimous Decision of the panel of the Fifth Circuit in *Doe v. Taylor Independent School District, supra,* 975 F.2d at 138, stated the following, in addressing similar issues: "You would think it obvious that ... molestation, when visited upon one of our school children ... would undoubtedly violate her constitutional right to be free from intrusions into bodily

integrity. You would also think it indisputable that a school superintendent and a school principal, once aware that such reprehensible conduct was taking place on their campus would have not only a moral duty, but also a legal duty, to stop it—that the Constitution would not tolerate their looking the other way or taking only meager measures to protect a 14 year old ... from being ... abused."

The Courts below overlooked the obvious and upheld the dismissal of the Amended Complaint in this action, finding themselves constrained to follow the Decisions of *DeShaney v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 109 S.Ct. 998 (1989), and *D.R. by L.R. v. The Middle Bucks Area Vocational Technical School, supra,* (1993).

The Courts below erred in failing to distinguish the facts underlying this tragic lawsuit with those at issue before the Third Circuit in *D.R. by L.R. v. Middle Bucks Area Vocational Technical School.* While the decedent's death admittedly occurred after school hours and off school property, there are numerous significant distinguishing features which make this case far more legally tenable than the factual scenario in *D.R. by L.R.* These significant distinguishing features include the following:

First, the Plaintiff's decedent in this action, unlike the Plaintiffs in *D.R. by L.R.,* was not a high school age student. He was only twelve years old and was a special education student in the seventh grade of junior high school. Moreover, while he was in the seventh grade at the time of his demise, he only had a tested and confirmed *third grade* education level.

As noted in the Dissenting Opinion of Chief Judge Sloviter, which was joined by three other judges of the Third Circuit, in *D.R. by L.R. v. The Middle Bucks Area Vocational*

and Technical School, a different level of protection should be afforded by public schools to its youngest and impaired students, as opposed to older mainstream students:

> "Elementary school age children are unlikely to be sufficiently independent of the school authorities to complain promptly to their parents about constitutional deprivations occurring at school, and even older students may be in comparable situations."

Id. at 1381.

As noted by the Court in *Pagano by Pagano v. Massapequa Public Schools,* 714 F. Supp. 641, 643 (E.D. N.Y. 1989), "We consider elementary school students who are required to attend school ... to be owed *some* duty of care by defendants ..." (public school and officials). In *Pagano,* the Court denied the defendants' Motions to Dismiss, where the Complaint contained similar allegations to those of the instant Amended Complaint, i.e. that "[D]uring his fifth grade year and for part of his sixth grade year, plaintiff alleges he was the target of physical and verbal abuse by other students resulting in physical and mental injury ... plaintiff further alleges that defendants were aware of the attacks and had expressly said they would take the necessary steps to prevent such attacks from occurring in the future." *Id.* at 642.

Therefore, the rationale of the majority Opinion in *D.R. by L.R. v. The Middle Bucks Area Vocational Technical School, supra,* that "... school children ... may turn to persons unrelated to the state for help on a daily basis ..." is not applicable to the instant factual scenario, involving a twelve-year-old with only a third grade education level. *Id.* at 1372.

A second distinguishing feature, already alluded to above, is the status of the Petitioner's decedent as a special education student, who had a tested and confirmed education level some

four grades below the grade in which he is enrolled. As again noted in the Dissenting Opinion of Chief Judge Sloviter in *D.R. by L.R.*, *id.* at 1381, a factual issue existed as to whether *D.R. by L.R.* was in a position to effectively seek help, given her status as an "exceptional student ...", who was "almost totally hearing impaired" and "her powers of articulation are seriously limited". The Courts below had no record before them to conclude, as did the majority in *D.R. by L.R.*, that Plaintiff's decedent had either the opportunity, or the ability, to "... turn to persons unrelated to the state for help on a daily basis." *Id.* at 1372.

A third significant and distinguishing feature in the instant action is that the incident which led to the death of Petitioner's decedent began in the context of a forced *detention* in which the decedent and his mainstream student tormentors were placed in close proximity to one another. This is in sharp contrast to the misconduct which took place with regard to the Plaintiffs in *D.R. by L.R.* which took place in a graphic arts classroom.

Thus, in the instant matter, as opposed to *D.R. by L.R.*, the triggering event which led to the death of Petitioner's decedent was a forced detention, which arose in the context of discipline, as opposed to classroom education. As noted in Chief Judge Sloviter's Dissenting Opinion in *D.R. by L.R.*:

> "During the school day, school officials exercise substantial control over students, either because they are considered to stand *in loco parentis* toward the students or because proper discipline so requires ... in their capacity as (parents) school officials can exercise control over the movement of their students."

Id. at 1380. (Citations omitted.)

It is notable that among the post-*DeShaney* cases which have found a custodial relationship existing between a school student and a school district is that of *Waechter v. School District No. 14-030,* 773 F. Supp. 1005, 1009 (W.D. Mich. 1991), wherein the District Court held that it was clear that the decedent student was in a custodial relationship with his teacher, who

> "... was aware of decedent's physical limitations and as recess monitor he undertook to supervise decedent's activities. As alleged in the Complaint, Gordon's (the teacher's) affirmative action led to decedent's death. The situation is clearly similar to that in Webb v. McCullough, 828 F.2d 1151 (6th Cir. 1987). In that pre-DeShaney case, the Sixth Circuit found that a high school teacher stands in an *in loco parentis* relationship with his students. This relationship heightens his responsibility for the student's well being. Accordingly, punishment which is not disciplinary in nature or which clearly exceeds reasonable discipline may amount to a substantive due process violation."

Similarly, in the instant matter, the punishment which was exacted upon the Petitioner's decedent was either not disciplinary in nature or clearly exceeded reasonable discipline. His detention with mainstream students was not disciplinary in nature, since, pursuant to his I.E.P., the Plaintiff's decedent was not to undergo detention with mainstream students. Such detention also clearly exceeded reasonable discipline for a special education student, inasmuch as his I.E.P. called for detention only with fellow special education students, not the mainstream students who had a history of picking on, ridiculing and harassing the "speds".

As noted above, at least one Circuit has recently held, in a unanimous Decision, that a school child is in the "functional custody" of school officials, even in a non-disciplinary setting. In *Doe v. Taylor Independent School District et al., supra,* 975 F.2d at 147, a unanimous Fifth Circuit stated the following in relevant part:

> "Although we too would not equate 'a school yard to a prison,' J.O. v. Alton Community Unit School Dist. 11, 909 F.2d 267, 272 (7th Cir. 1990), we nevertheless find a schoolchild to be in the 'functional custody' of school officials. (cits. omitted) Separated from his or her parents (guardians), the child's safety and well-being are entrusted to school officials. Contra (cits. omitted) Parents, guardians, and the children themselves have little choice but to rely on the school officials for some measure of protection and security while in school and can reasonably expect that the state will provide a safe school environment. To hold otherwise would call into question the constitutionality of compulsory attendance statutes, for we would be permitting a state to compel parents to surrender their offspring to the tender mercies of school officials without exacting some assurance from the state that school officials will undertake the role of guardian that parents might not otherwise relinquish, even temporarily."

Therefore, the Courts below failed to consider a crucial distinguishing feature of the instant factual scenario, i.e. that the triggering event which led to the death of Plaintiff's decedent arose as the result of a forced *detention,* a punishment which was in direct contravention of the I.E.P. prepared for David B. Hadden.

Fourth, this matter is further distinguishable from the situation in *D.R. by L.R.*, inasmuch as there was no prior opportunity to provide notice to the decedent's parents of his detention with mainstream students, which was in violation of his I.E.P. This absence of notice to the decedent's parents rendered him without assistance to escape the shocking and unfortunate series of events which unfolded as a result of, and following his detention with mainstream students. This absence of notice to the decedent's parents renders meaningless those portions of the rationale of *D.R. by L.R.*, wherein the majority set forth the following in relevant part, at 1372:

> "... school children remain resident in their homes. Thus, they may turn to persons unrelated to the state for help on a daily basis. D.R.'s Complaint alleges an ongoing series of assaults and abuse over a period of months. Although these acts allegedly took place during the school day, D.R. could, and did, leave the school building every day. The state did nothing to restrict her liberty after school hours and thus did not deny her meaningful access to sources of help."

In sharp contrast, the instant situation arose without an opportunity for the Plaintiff's decedent to turn to his parents, friends, or any other source of help to avoid the reach of his tormentors who relentlessly chased and/or pushed him to his cruel and barbaric death.

The Courts below either chose to ignore or failed to discern the above significant differences between the factual scenario of the instant Amended Complaint and that before the Third Circuit. Even assuming *arguendo* that the Opinion of the narrow majority in *D.R. by L.R.* is appropriate for mainstream high school age students who are engaged in educational activities, it is respectfully submitted that the *D.R.*

by L.R. Decision should not have been dispositive in ruling upon the Defendants' Motions to Dismiss the Amended Complaint in the instant action.

Petitioner submits that the Courts below, in failing to discern the numerous significant differences between this action and *D.R. by L.R.*, failed to provide any level of constitutional protection for public school students to be free from unwarranted physical and sexual abuse, and in particular, for special education, non-secondary students such as Petitioner's decedent. This Court should grant this Writ in light of (1) the frequency with which school room/school yard/schoolbus/physical/sexual abuse cases have arisen since *DeShaney;* and (2) the split amongst lower Federal Court judges and Circuits as to (a) the reach of the *DeShaney* rule and (b) the appropriateness of such reach.

A table of federal judge views as to the coach of *DeShaney* in the school room context is as follows:

> A special relationship *does* exist: Doe v. Taylor Independent School District, supra; Maldonado v. Josey, Supra (concurring opinion); Robt. G. v. Newburgh City School Dist., 1990 U.S. Dist. Lexis 91 (S.D. N.Y.); Doe v. St. Louis Special School Dist., 637 F. Supp. 1138 (E.D. Mo. 1986); Waechter v. School Dist. No. 14-030, 773 F. Supp. 1005 (W.D. Mich. 1991); Whitt v. Deleu (W.D. Wisc., 87-C-324-C, July 19, 1989) (32 ATLA L.Rptr. 423 (1989)); Pagano by Pagano v. Massapequa Public Schools, 714 F. Supp. 641 (E.D. N.Y. 1989); Stauffer v. Orangeville School Dist. et al., 1990 U.S. Dist. Lexis 19133 and 19041 (N.D. Ill. 1990) (conditionally exists).
>
> A special relationship *does not* exist: Black v. Indiana Area School District, 985 F.2d 707 (3rd Cir. 1993); D.R. by L.R. v. The Middle Bucks Area Vocational Technical

School, supra; Maldonado v. Josey, supra, (majority opinion); J.O. v. Alton Community Unit School District 11, 909 F.2d 267 (7th Cir. 1990); Dorothy J. v. Little Rock School District, 794 F. Supp. 1405 (E.D. Ark. 1992); Arroyo v. PLA, 748 F. Supp 56 (D.P.R. 1990); Elliott v. New Miami Board of Education, 1991 U.S. Dist. Lexis 13985 (S.D. Ohio); Doe v. Douglas County School Dist., 770 F. Supp. 591 (D. Colo. 1991); Russell v. Fannin County School Dist., 784 F. Supp. 1576 (N.D. Ga. 1992); Reeves by Jones v. Besonen, 754 F. Supp. 1135 (E.D. Mich. 1991); Fenstermaker v. Nesfedder, 802 F. Supp. 1258 (E.D. Pa. 1992); Robbins v. Maine School Admin. Dist. No. 510, 807 F. Supp. 11 (D.M.C. 1992).

Petitioner suggests that a reasoned neutral principle of decision can be derived from the *DeShaney* Opinion wherein a person such as her decedent is entitled to Constitutional protection of their liberty interest in those circumstances where conduct of the school officials has increased the peril to which a student is subject from her or his schoolmates. See, for example, the Dissenting Opinion of Judge Becker in *D.R. by L.R., supra* and that of Judge Roszkowski in the Northern District of Illinois in *Stauffer v. Orangeville School District et al.*, 1990 U.S. Dist. Lexis 19133 and 19041 (N.D. Ill. 1990).

Petitioner respectfully requests that in light of the foregoing, this Court grant this Writ so that it may address the important question of under what circumstances do public school authorities have a duty to protect and preserve school children's liberty interests to be free from unconsented-to physical and sexual contact.

CONCLUSION

For all of the reasons set forth in this Petition, particularly because of the conflict among the Circuits and because of the importance of these issues to the proper administration of the public schools, as well as to the safety and protection of our public school children, this Court should grant this Writ of Certiorari.

Respectfully submitted,
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APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

No. 3 : 91-1564

DOROTHEA HUNTER, Administratrix of the Estate of DAVID B. HADDEN, deceased and in her own right,

Plaintiffs

vs.

CARBONDALE AREA SCHOOL DISTRICT and NORTHEASTERN EDUCATION INTERMEDIATE UNIT #19

Defendants

MEMORANDUM AND ORDER

Plaintiff, Dorothea Hunter, Administratrix of the Estate of David B. Hadden, deceased, and in her own right, filed this civil rights action on November 16, 1991 against the Defendants, Carbondale Area School District and Northeastern Education Intermediate Unit #3*. An amended complaint was later filed by the Plaintiffs on January 2, 1992. The Plaintiffs allege that the conduct of the Defendants violated the decedent's civil rights under Title 42 U.S.C. § 1983, the Fourteenth and Eighth Amendments to the United States Constitution, 28 U.S.C. 1331 and 1343, as well as Article I, Section I of the Pennsylvania Constitution, the Federal Handicap Statute 20 U.S.C. § 1400, *et seq.*, the Vocational Rehabilitation Act, 29 U.S.C. § 794 and the various provisions of the Pennsylvania

Education Act. Plaintiffs also assert pendant state law claims for reckless infliction of emotional distress upon Dorothea Hunter, and gross negligence and reckless conduct pursuant to supplement jurisdiction under 28 U.S.C. 1367. The Plaintiff* have listed ten (10) counts against the Defendants, seeking fifty thousand ($50,000.00) dollars in damages and attorney's fees. (Doc. No. 5).

The case is before the Court on the Defendants' Motion to Dismiss under Fed. R. Civ. P. 12(b) for failure to state a claim. (Doc. Nos. 18 & 20). The Plaintiff have* previously filed a brief in opposition to the Defendants' Motions to Dismiss the case. (Doc. No. 26).

This Court issued an Order to all parties dated March 20, 1992, noting that a similar case was pending before an en banc panel of the Third Circuit Court of Appeals entitled *D.R., et al v. Middle Bucks Area Vocational Technical School, et al.*, No. 91-1136 and 91-1137, slip op. (3d Cir. 1991), *rehearing en banc granted, opinion vacated* (January 24,1992). Accordingly, by order dated March 20, 1992 we held that once a Decision was rendered in the *D.R.* case, the Defendants could submit additional information in light of the opinion. On August 11, 1992 the Third Circuit Court of Appeals affirmed the District Courts dismissal of a complaint that was similar to the one brought by the Plaintiffs in the present action. *See D.R. by L.R. v. Middle Bucks Area Vocational Technical School, et al.*, 972 F.2d 1364 (3d Cir. 1992). The Defendants have filed supplemental briefs to their Motions to Dismiss. (Doc. No. 30 & 31). Plaintiffs have also filed a supplemental brief in opposition to the Motion to Dismiss the Plaintiff's complaint. (Doc. No. 32). The Court will address the arguments raised in the supplemental briefs filed by both Plaintiffs and Defendants.

BACKGROUND

Plaintiffs, Dorothea Hunter, Administratrix of the Estate of David B. Hadden, the decedent, and Dorothea Hunter in her own right, filed suit against Defendants as a result of the drowning death of the Plaintiff's minor decedent on November 16, 1989. The Plaintiff, Dorothea Hunter, resides at 288 Park St., Carbondale, Pennsylvania. The Decedent who was age twelve (12) years of age at the time of his death resided with his mother, Dorothea Hunter and his grandmother. The Decedent was a seventh grade special education student at the Carbondale Area Junior-Senior High School, Carbondale, Pennsylvania and was considered an "exceptional student" as defined by both Federal and State law. As such, the Decedent was designated to receive an education under the "Individualized Education Program" that was mandated by both the Federal and State law which program was prescribed and implemented by the Defendants.[1]. (hereinafter I.E.P.). The I.E.P. is designed to identify the student's educational level and set precise goals for the specific education service programs that are provided to the student. The I.E.P also designates the specific placement and the extent to which the student will be able to participate in regular educational programs. On April 6, 1989 an I.E.P. printout indicated that the Decedent was to be placed in a "Secondary/Part-time" Program for Learning Disabled Students and was not to participate in any regular "mainstream" education except for specific areas of music, gym and home economics. The Decedent attended seventh (7th) grade as a Special Education Student at Carbondale Area

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[1] The pertinent federal statutes that apply are the Disabilities Education Act, 20 U.S.C. §1400, *et seq.* and the Vocational Rehabilitation Act of 1973, 29 U.S.C. §794. The State Statutes that apply are found in Title 24, Education of the Pennsylvania Consolidated Statutes, 24 Pa. C.S.A. §13-1317, 1327, 1333, 1343 and 1372.

Junior High School located on Route 6 in Carbondale, Pennsylvania which building housed grades 7-12.

On November 15, 1992, the Decedent allegedly became involved in an altercation with another student in the hallway of the Carbondale Area High School during school hours which resulted in the Decedent being sent to detention after school the following day. On November 16, 1989, the Decedent reported for detention after school classes ended for the day. During the detention period, the Decedent was involved in another altercation with other juvenile individuals, which led to a chase through the hallways after the boys were released from detention. The Decedent ultimately escaped the juveniles, however, they again spotted the Decedent outside the school building where they continued chasing him off school grounds, across Route 6 and eventually to an embankment along a nearby stream. While attempting to flee his pursuers, the Decedent either slipped, stumbled or was forced into the stream. The Plaintiffs allege that the juvenile youths saw the Decedent in the waters of the stream but did not do anything to help him. In fact, the Plaintiffs allege one of the youths picked up the Decedents school books that were lying on the side of the embankment and threw them in the water at the Decedent yelling "Catch these!". Tragically, the Decedent drowned in the stream. Although he was declared missing on November 17, 1989, his body was not found until March 19, 1990, downstream in Scranton, Pennsylvania. A subsequent autopsy by the County Corner* determined the cause of death was hyperthermia* and drowning.

Plaintiffs allege that the conduct of the Defendants violated the Decedent's civil rights under 42 U.S.C. § 1983, his Fourteenth Amendment rights under the United States Con-

stitution, as well as various rights under the Pennsylvania Constitution and other federal and state enactments.

It is under this factual background that the Court will review and analyze the above motion.

MOTION TO DISMISS

In deciding a Motion to Dismiss, all material allegations must be accepted as true and construed in a light most favorable to the non-moving party. *Truehe v. Rapell,* 641 F. Supp. 57 (M.D. Pa. 1985). A complaint may be dismissed only if it appears that the Plaintiff cannot prove any set of facts in support of his claim that would entitle him to relief. *Id.* The Court must view all allegations made in the complaint, as well as all inferences reasonably drawn therefrom, in favor of the Plaintiff. *Strum v. Clark,* 835 F.2d 1009 (3d Cir. 1987). Because a Motion to Dismiss results in a determination on the merits at the earliest stage of the proceedings, the Court is obligated to construe the Plaintiff's complaint in favor of the Plaintiff. *Pittsburgh National Bank v. Welton Becket Associates,* 601 F. Supp. 887 (W.D. pa. 1985). A complaint should never be dismissed for failure to state a claim unless the court is convinced beyond doubt that the Plaintiff can prove no set of facts to support a claim which would permit a recovery. *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957); *Hooten v. Pennsylvania College of Optometry,* 601 F.Supp. 1151 (E.D. Pa. 1984).

A. Violation of Civil Rights Pursuant to 42 U.S.C. § 1983

The Plaintiffs'[•] assert that under applicable state law a special relationship existed between the Defendants and the students entrusted to their care including Plaintiff's decedent, David Hadden, and the other juvenile individuals. The Plaintiffs further allege that the Defendants had a right to control

and discipline the students. In essence, the Plaintiffs allege that the Defendants deprived the Decedent of his liberty without due process of law when a special relationship existed, in violation of his rights under the Fourteenth Amendment, by failing to protect against a risk of violence when the Decedent was placed in detention after school on the afternoon of November 16, 1989 with other non-exceptional students.

The Due Process Clause of the Fourteenth Amendment provides that "no State shall ... deprive any person of life, liberty, or property, without due process of law". Plaintiffs assert that the State deprived the Decedent of his liberty interest by failing to provide him with adequate protection against the other student's violent behavior. It is a well-established principle that the Due Process Clause does not impose an affirmative duty upon the state to protect its citizens. Rather, there is nothing in the language of the Due Process Clause of the Fourteenth Amendment, that requires a state to protect the life, liberty and property of it's* citizens against harm by private actors. The Due Process Clause is phrased to limit the State's power to act, not as an assurance of certain minimal levels of safety. *Deshaney *v. Winnebago County Dept. of Social Services,* 489 U.S. 189, 195 (1989); *Fialkowski v. Greenwich Home for Children, Inc.*, 921 F.2d 459, 465 (3d Cir. 1990); *D.R. v. Middle Bucks Area Vocational-Technical School,* 972 F.2d 1364 (3d Cir. 1992). "The purpose of the Due Process Clause was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to the democratic political processes." *See Deshaney* *at 196. However, when the state enters into a "special relationship" with a citizen, it can be liable to that citizen for the private actions of third parties. *See Cornelius v. Town of Highland Lake, Ala.*, 880 F.2d 348, 352 (11th

Cir. 1990). Liability against a state actor attaches under 42 U.S.C. § 1983 when the state fails, under certain blameworthy circumstances, to protect the health and safety of the citizen to whom it owes an affirmative duty. *See Cornelius* at 353.

In the present case, the Plaintiffs contend that under existing federal and state statutes a special relationship existed between the parties. This Court must decide whether the school Defendants had such a special relationship with the Plaintiffs by virtue of the fact that the Decedent was placed in special education courses at Carbondale Area Junior High School as required by federal and state law. Plaintiffs argue that the state entered into a special relationship when they restrained the Decedent's freedom to act by placing him in detention after school.

The United States Supreme Court in *Deshaney* v. Winnebago County Dept. of Social Services, supra,* refused to impose a constitutional duty upon a state to protect the life, liberty or property of a citizen from the deprivations by private actors absent the existence of a special relationship between the parties. *DeShaney,* involved the state's repeated receipt of reports of abuse of a minor by his father. The state agency received reports of repeated instances of child abuse by the father but failed to remove the baby from the home. The father eventually beat the child so severely that the child fell into a life-threatening coma. The child and his mother filed a 42 U.S.C. § 1983 action against state officials claiming that they deprived the minor of his liberty without due process of the law in violation of the Fourteenth Amendment by failing to protect him against the risk of violence from the father and by failing to remove him from the violent enviorment*.

In *DeShaney,* the Court determined "a State'* failure to protect an individual against private violence by a third party

simply does not constitute a violation of the Due Process Clause," *DeShaney,* at 197. The Court noted, however, that in certain limited circumstances the Constitution does impose upon a State an affirmative duty to protect and care for certain private individuals. For example, in, *Estelle v. Gamble,* 429 U.S. 97 (1976) the Court found that a State did have an affirmative duty to provide adequate medical care for prisoners due to the fact that incarceration prevented the inmates for caring for themselves. The Court later broadened *Estelle* by imposing a duty of care on the State to provide protection and care for involuntarily committed mental patients. *See Youngberg v. Rome,* 457 U.S. 307 (1962).

A review of the Plaintiffs' Amended Complaint reveals that the *Estelle-Youngberg* exceptions are not applicable to this case. However, the Plaintiffs assert that the state owed a duty to the Decedent

> "when the Defendants took the Decedents into their custody and held him against his will in detention, the Constitution imposed a duty to assume some responsibility for his safety and well-being". (See Amended Complaint, Doc. No. 5).

A review of a recent decision by the Third Circuit that is very similar to the present case, further affirms the fact that the Defendants in no way violated the Plaintiff's due process rights. In *D.R. v. Middle Bucks Area Vocational Technical School,* 972 F.2d 1362 (3d Cir. 1992), the Third Circuit examined the liability of a school district on school property during school hours.

More specifically, Plaintiffs in *D.R.* were two female students in a graphic arts class at Middle Bucks Area Vocational Technical School. The Plaintiffs alleged that while attending the arts class during the 1989-90 school year, several

male students in the same class sexually abused them. The conduct had taken place in the unisex bathroom and darkroom, both of which were part of the graphic arts classroom. The Plaintiffs asserted the abuse took place two to four times per week mostly from January to May of 1990. One of the Defendants in the case was the student teacher in the graphic arts classroom during the time of the alleged conduct in question. The Plaintiffs asserted that the student teacher should have been in the classroom when the conduct had taken place or either heard or should have heard the incidents taking place. It was learned during the case that the student teacher had difficulty controlling the behavior of the class, specially where some of the misconduct was the student defendants using obscene language and gestures including physically but not sexually touching the females, including the student teacher in the classroom. After noting the appropriate standard of review on a motion to dismiss, the Court followed the U.S. Supreme Court's Decision in *DeShaney, supra* and declined to impose any constitutional duty upon a school district to protect students from misconduct by other student Defendants. The issues decided in *D.R., supra,* were nearly identical to those in the present case.

In *D.R., supra,* the Plaintiffs as in the present case pleaded that the state statute's combined with the Defendants' *in loco parentis* responsibility formed a special relationship as outlined under *DeShaney.* The Court carefully considered Pennsylvania's scheme of compulsory attendance and the school's exercise of *in loco parentis* authority over their pupils, and rejected the Plaintiffs' arguments that the school district "restricted" the students• freedom of movement because the state law required the students to attend school every day.

Pennsylvania law mandates that every child until the age of seventeen (17) years is of "compulsory school age" and therefore must attend a school daily. *See* Pa. Stat. Ann. tit. 24 13-1327. Failure to attend classes results in penalization of parents.

See Pa. Stat. Ann. ti. 24 § 13-1333 and 1343. The Court in *D.R.* and the U.S. Supreme Court in *DeShaney* decided that state statutes requiring students to attend school do not rise to the level where the state prevents the students from meeting their basic needs as outlined in *DeShaney.*

In *D.R.*, the Third Circuit examined the *DeShaney* Court's rationale for the *Estelle-Youngberg* exception and looked to whether or not compulsory attendance paired with the *in loco parentis* authority of the school defendants resulted in an affirmative restraint of the Plaintiff's liberty "by the state that she was left without reasonable means of self-protection". *See D.R.* at 1370.

However, the *Estelle-Youngberg* type of custody referred to by the Court in *DeShaney,* was different from that of the *D.R.* Plaintiffs' and the Plaintiffs' in the present case. The state's duty to inmates in state prisons and patients involuntarily committed in mental institutions exists because of the full time continuous restriction of liberty in both enviorments.* Prisoners and patients are totally dependant upon the state for the most basic needs of food, shelter, medical care and clothing. These individuals are not in a position to care for themselves and their freedom is obviously restricted.

In the present case it was the Decedent's mother who decided where the education of the Decedent would take place. For example, the Decedent's mother had the option of a private or public education. This type of discretion is even more prevalent in cases of special education students, where

the parents have even greater control since they must approve the precise educational program developed for their child. *See* 20 U.S.C. § 1415 (1988); 22 Pa. Code §§ 14.32, 14.61-68 (1992). The Decedent's mother had personally participated in and approved of the I.E.P. developed for the Decedent. However, the Decedent's mother did not desire to participate in a Program Planning Meeting that was used to complete the I.E.P. See exhibits attached to the Plaintiff's Responsive Brief in opposition to Defendant's Motions to Dismiss Plaintiff's Amended Complaint. (Doc. No. 26). If the Decedent's mother had not approved the I.E.P. or had she feared for the health and safety of the Decedent then she could have been justified in withdrawing the child from Carbondale Area Junior High School. *See Zebra v. School District of City of Pittsburgh,* 296 A.2d 748 (Pa. 1972).

Finally, the Third Circuit in *D.R.* specifically determined that:

> "the school defendants' authority over D.R. during the school day cannot be said to create the type of physical custody necessary to bring it within the special relationship noted in *DeShaney,* particularly when their channels for outside communication were not totally closed." *See D.R.* at 20.

The Third Circuit emphasized that parents remain the primary caretakers of students despite the fact that students are required by law to attend class every day. *See 28 P.A. STAT. ANN. tit.* 24, § 13-1301 (1992).

> "It is the parents who decide whether that education will take place in the home, in public or private schools or, as here, in a vocational-technical school. *DeShaney.* For some, the options may be limited for financial reasons. However, when enrolled in pubic* school parents

retain the discretion to remove the child from classes as they see fit. *See Pa. Stat Ann tit 24 § 15-1546* (1962 & Supp 1991) (religious instruction); *22 Pa Code § 11.26* (1992). In the case of special education students, the parents have even greater involvement since they must approve the precise educational program developed for their child. 20 U.S.C. § 1415 (1988); *22 Pa Code §§ 14.32, 14.61-68* (1992)." *See D.R.* at 1371.

Parents are and remain the primary caretakers of students even thoı gh state laws require the students• presence in school and grant Pennsylvania teachers and principals *in loco parentis* status, *See Pa Stat. Ann tit 24 § 13-1317.* This particular section acts in conjunction with section 5-510 which permits school boards and management to set and maintain reasonable regulations that govern student's conduct.

Therefore, in the present case the Defendants• authority over the Decedent during the school day cannot be said to create the type of physical custody necessary to bring it within the special relationship noted in *DeShaney* and *D.R., supra,* especially when all channels for communication to the outside were not totally closed. There is no evidence in the present case that the Decedent was forced or intimidated by the Defendants to report for detention. The Decedent could have decided not to report to detention for the day.

B. State Created Danger

The Plaintiffs'• have also asserted that the Defendants are liable because Defendants placed the Decedent in an enviorment• with other students who were dangerous toward the Decedent thereby violating the Plaintiffs' constitutional rights under the Fourteenth Amendment pursuant to 42 U.S.C. § 1983;

"in a detention room with non-special education students who were older, in senior grades, more physically developed that• David B. Hadden and who were known to have had a lengthy history of animosity toward and abuse of David B. Hadden which actions ultimately led to the foreseeable result of physical harm upon the person of David B. Hadden."

The Plaintiffs'• assert that the Defendants placed the Decedent at peril when he was placed in the detention room with the other students when the Decedent was only "a frail 70 lbs special education student of tender years."

In determining whether or not the Defendants are liable under this theory, post-DeShaney courts have "asked whether the state actors involved affirmatively acted to create Plaintiff's danger, or to render him or her more vulnerable to it. *See D.R.* (citing *Bryson v. City of Edmond*, 905 F.2d 1386, 1392 (10th Cir. 1990)).

The state created danger theory, utilized to find a constitutional tort duty under § 1983 outside a strict custodial setting is viable in limited circumstances. "Liability under the state-created danger theory is predicated upon the states' affirmative acts which work to Plaintiffs' detriment in terms of exposure to danger." *Id 1374. See also Cornelius v. Town of Highland Lake*, 880 F.2d 348 (11th Cir. 1989); *Wood v. Ostrander*, 879 F.2d 583 (9th Cir. 1989); and *Brown v. Grabowski*, 922 F.2d 1097 (3d Cir. 1990). In *Brown, id*, the Third Circuit concluded that a Plaintiff must supply the Court with evidence that the state actors acted to create the danger that the third party produced against the Plaintiff thereby triggering a viable constitutional duty to assist the Plaintiffs' access to the civil courts.

In *D.R.* the Third Circuit found that even though one school defendant was aware of suspicious activity and failed to investigate, such nonfeasance did not rise to the level of a constitutional violation. As the U.S. Supreme Court said in *DeShaney,* "the most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them". *D.R.,* at 1369, (quoting *DeShaney v. Winnebago County Dept. of Social Services,) supra.*

In the present action there is nothing in the record before the Court that suggests that either Defendant encouraged, facilitated or authorized the students to engage in the conduct which took place. There is no evidence at all that the Decedent would be attacked and pursued after the detention period ended by the other juveniles. The only notice that the school had of any danger to the Decedent was the incident which occurred the day before which led to the Decedent being detained after school on November 16, 1989.

As in the *D.R.* case and *Brown* there is no evidence indicating the Defendants created the Decedent's peril, added to the risk of harm to the Decedent or acted to render the Decedent more vulnerable to the alleged student Defendants' conduct. The unwarranted assault against the Decedent was perpetuated by private individuals off school property and after school was over for the day. In short, the Plaintiff's allegations are insufficient to demonstrate, as required under *DeShaney,* that the Defendants had limited the decedents' freedom to move or barred his access to outside support. Nor have the Plaintiffs shown that the Defendants violated a constitutional duty by creating the danger posed by the other students. *See Brown* 922 F.2d at 1116.

C. State Established Policy, Custom and Practice

The third theory utilized by the Plaintiff's,* is the contention that the Defendants acting under the color of state law and in furtherance of the Defendant's established custom, practice and policy, comprised a denial of the Plaintiff's protected liberty interest under the Fourteenth Amendment. (See Amended Complaint, Count I and Count III). In *Stoneking v. Bradford Area School District,* 882 F.2d 720, 725 (3d Cir. 1989), *cert. denied* 493 U.S. 1044, (1990) (Stoneking II) the Third Circuit decided that the necessary element of liability is a violation by state actors not private individuals. The assault against the Decedent and the subsequent chase off school property, across Route 6 to the embankment of the stream was done by other students who were private actors. Thus, liability in the present case under this theory cannot be found under 42 U.S.C. § 1983.

D. State Constitution and State Law Claims

The Plaintiffs have sought to impose liability on the Defendants through alleged violations of the Pennsylvania Constitution and Pennsylvania State Statutes. This argument stems from the position that the Defendants acting under color of state law violated the Decedents'* rights when the Decedent was placed in the detention room with other mainstream students. However, it is certain that a violation of a duty under a state statute, by itself, in* not sufficient to state a § 1983 claim. *See Brown,* 922 F.2d at 1113 (citing *Maine v. Thiboutot,* 448 U.S. 1 (1980)). "Section 1983 liability arises only from a violation of federal statutory or constitutional rights under color of state law. *D.R. v. Middle Bucks Area Vocational-Technical School,* at 1375 (quoting *Brown v.*

Grabowski 922 F.2d 1097 (3rd Cir. 1990)).[2] In the present case, the Plaintiffs'• have asserted liability against the Defendants through state law and state constitutional claims. These claims must fail due to the recent decisions cited in the *D.R.* decision.

It would be impossible to overstate the tragedy suffered by this family, but the law does not impose any special liability on public officials under such circumstances.

CONCLUSION

Based on the forgoing reasons, this Court grants the Defendants' Motion To Dismiss the Plaintiff's Amended Complaint in it's• entirety.

An appropriate Order is Attached.

/s/Richard P. Conaboy
United States District Judge

DATE: 1/7/93

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[2] After *DeShaney* the Third Circuit has decided not to impose liability under § 1983 when the circumstances of the case are distinguished between affirmative duties of care imposed by a state on its agents through state statute and of constitutional duties to protect those whose basic needs are taken away from them as outlined in *DeShaney* and *D.R.*, "we can no longer rely on the statutory and common law duties imposed in Pennsylvania on school officials as the basis of a duty to protect students from harm occurring as the result of a third person". *See Stoneking II at 723.*

IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIV.NO. 91-1564

DOROTHEA HUNTER, Administratrix of the Estate of DAVID B. HADDEN Deceased, and DOROTHEA HUNTER, in her own right,

Plaintiffs

vs.:

CARBONDALE AREA SCHOOL DISTRICT and NORTHEASTERN EDUCATION INTERMEDIATE UNIT NO. 19 (N.E.I.U. NO. 19),

Defendants

ORDER

AND NOW, THIS 7th DAY OF January, 1993, IT IS HEREBY ORDERED THAT:

1. The Defendant's Motion To Dismiss the Plaintiff's Amended Complaint is Granted.

2. The Clerk of Courts is directed to close the case.

/s/Richard P. Conaboy
United States District Judge

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 93-7053

DOROTHEA HUNTER,
Administratrix of the Estate of David B. Hadden, deceased,
and in her own right,

Appellant

v.

CARBONDALE AREA SCHOOL DISTRICT;
NORTHEASTERN EDUCATION
INTERMEDIATE UNIT NO. 19
(N.E.I.U. NO. 19)

On Appeal from the United States District Court for the
Middle District of Pennsylvania
(D.C. Civ. No. 91-1564)
District Judge: Honorable Richard P. Conaboy

Submitted under Third Circuit LAR 34.1(a)
July 21, 1993

BEFORE: MANSMANN, GREENBERG, and LEWIS,
Circuit Judges
(Filed: JUL 26 1993)

MEMORANDUM OPINION

GREENBERG, Circuit Judge.

Dorothea Hunter, as administratrix of the Estate of David B. Hadden, deceased, and in her own right, appeals from the order entered January 8,* 1993, granting the defendants' motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(6) for failure to state a claim on which relief may be granted. The district court entered the order in accordance with its comprehensive memorandum opinion which correctly recognized that the motions should be denied unless the court was convinced that there was no set of facts which the plaintiff could prove that could permit a recovery.

We have, of course, reviewed this case with great care as no court could be insensitive to the tragedy underlying this lawsuit. Yet at bottom we are convinced, exercising plenary review, that in the light of *DeShaney v. Winnebago County Dep't of Social Services,* 489 U.S. 189, 109 S.Ct. 998 (1989), and *D.R. v. Middle Area Vocational Technical School,* 972 F.2d 1364 (3d Cir. 1992) (in banc)*, *cert. denied,* 113 S.Ct. 1045 (1993), the district court was constrained to grant the motions. In fact, the plaintiff's legal position is probably less tenable than that of the plaintiffs in *D.R.*, as the conduct which led directly to the decedent's death was after school and not on school grounds. Indeed, it appears that the attorneys for the plaintiff recognize that the weight of authority is against the plaintiff for in their brief, after correctly pointing out that *D.R.* was decided by a "narrow margin," they indicate "that this case presents this Honorable Court with an opportunity to reconsider and to either overrule or place appropriate limits on its decision in *[D.R.]*. Of course, this panel, no less than the district court is bound to apply *DeShaney* and *D.R.* unless

those cases can somehow be distinguished on their facts in a germane way from the facts in this case. But inasmuch as *D.R.* cannot be so distinguished and the principles of those cases are applicable here, we will affirm.

We make one further comment. The district court granted the defendants' motions to dismiss which means that it found the complaint insufficient on its face. Nevertheless, the parties submitted various materials on the motion which may well have had the effect of converting the motions into motions for summary judgment. *See Rose v. Bartle,* 871 F.2d 331, 339-43 (3d Cir. 1989). While we are not clear which, if any, of the exhibits the district court considered, in our determination we have taken the entire record into account. This has not resulted in any change in our standard of review as we exercise plenary review on appeals from orders granting summary judgment. But with or without consideration of these materials, our conclusion that the district court reached the correct result is the same.

In view of the foregoing, the order of January 8,* 1993, will be affirmed. The parties will bear their own costs on this appeal.

TO THE CLERK:

Please file the foregoing opinion.

/s/Greenberg
Circuit Judge

DATED: JUL 26 1993

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 93-7053

DOROTHEA HUNTER,
Administratrix of the Estate of David B. Hadden, deceased, and in her own right,

Appellant

v.

CARBONDALE AREA SCHOOL DISTRICT; NORTHEASTERN EDUCATION INTERMEDIATE UNIT NO. 19
(N.E.I.U. No. 19)

On Appeal from the United States District Court for the Middle District of Pennsylvania
(D.C. Civ. No. 91-1564)

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, *Chief Judge*, and BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, and LEWIS, *Circuit Judges*

The petition for rehearing filed by the appellant Dorothea Hunter in the above captioned matter having been

submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the court in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc,* the petition for rehearing is denied. Chief Judge Sloviter, Judge Becker, and Judge Nygaard would grant rehearing by the court in banc .*

BY THE COURT
/s/Greenberg
Circuit Judge

DATED: AUG 19 1993

*Errata in original